IN THE

Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1979

NO. ____

79-1090

PAY'N SAVE CORPORATION, a corporation
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF WASHINGTON RETAIL COUNCIL, AMERICAN RETAIL FEDERATION, AND NATIONAL ASSOCIATION OF CHAIN DRUG STORES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI

A. Identification of Amici

The Washington Retail Council is a division of the Association of Washington Business, which represents the interest of all businesses in the

State of Washington. It is a member of the American Retail Federation and a reasonable microcosm of the other member associations. It has approximately 800 members, 90% of which are small businesses. It has endeavored to promote efficiency in business to meet the needs of the consuming public, and has been active in a wide variety of consumer oriented legislation. The majority of its retailers distribute food, drugs, cosmetics, or devices. In order to remain competitive, many of these retailers must resort to cooperative advertising of these products.

The American Retail Federation is comprised of retail associations from all 50 states and the District of Columbia, together with 21 national retail associations. Enterprises which belong to the member associates are of all sizes, representing both local and national retailers, totalling approximately 1.5 million retail entities, representing between 70 and 80% of the entire retail industry employing a work force of over 12

million people and contributing approximately one-third of the gross national product. The Federation, functioning as a national level representative for its members, is actively involved in issues of national or federal scope with impact upon the retail industry. The substantial majority of all retailers so represented deal regularly in food, drugs, cosmetics or devices.

The National Association of Chain Drug Stores (NACDS) represents an active membership of over 195 chain drug corporations and 380 associate member supplier firms. The active chain drug members operate more than 11,500 retail outlets in every state of the union, ranging from small prescription-oriented units to large departmentalized stores, and they employ in excess of one million workers. Millions of consumers rely on member stores for vital products and services. For the fiscal year ending 1977, total sales of member stores approximated $13.9 billion. A substantial

portion of sales of NACDS members consists of food, drugs, cosmetics or devices. During fiscal 1977, fully 41% of the industry's total sales were attibutable to non-prescription medicine, cosmetics and toiletries. To remain competitive in retailing these products, association members, and particularly the smaller ones, must rely upon cooperative advertising.

All three organizations, through the undersigned, joined in an amicus brief filed in the case below.

B. Impact of Lower Court Decision Upon Amici

Amici have a vital interest in seeking review of the decision of the court of appeals. If allowed to stand, that decision would subject retailers using cooperative advertising for food, drugs, cosmetics or devices to a strict liability standard under the Federal Trade Commission Act (15 U.S.C. § 41 et seq.) should they disseminate advertising found to violate § 12 of the Act (15

U.S.C. § 52) even without knowledge of its falsity. This interest is all the more immediate because of § 5(m) of that Act (15 U.S.C. § 45(m)), which would subject every retailer in America that ever obtains knowledge of the order in the present case to civil penalty if it runs advertising of a food, drug, cosmetic or device covered by this order. This threat exists even though these retailers were not parties to the present proceeding nor involved in the advertising campaign giving rise to it. Amici are also concerned that because of § 5(m) of the Act, the court's interpretation of § 12 will hang like a pall over all advertising of food, drugs, cosmetics and devices. They are concerned that there will be prior restraint upon their commercial speech in violation of the First Amendment not only as to the product in question, but as to other food, drugs, cosmetics or devices.

STATEMENT OF CASE

Amici adopt the statement of the case set out in the Petition of Petitioner Pay'n Save Corporation

as to the history of the proceedings prior to consolidation of the appeal before the Court of Appeals for the Seventh Circuit.

After the case was consolidated in the Seventh Circuit, Amici, with the consent of all parties, filed a Brief in support of the position of petitioner Pay'n Save. The court, after all arguments, then rendered its decision on August 8, 1979, affirming the Federal Trade Commission decision with modifications. Porter & Dietsch, Inc. v. FTC, 605 F.2d 294 (7th Cir. 1979). It noted that only the retailer, of all the petitioners, did not have an active role in the creation of the advertisements in question and was not aware that representations in them posed potential legal problems, and noted that

> [n]othing in the record indicated that Pay'n Save had any knowledge that the representations in the advertisements were false or unsubstantiated.

Id. at 297. Nevertheless, it held that § 12 of the Act (15 U.S.C. § 52) "imposes a strict liability

standard on disseminators of false advertising." Id. at 309. It then modified the Commission's order as it applied to Pay'n Save, so that it covered only advertising of Porter & Dietsch products. Id. at 309-10. The court apparently did not consider the impact of their decision upon the retailing industry in general through § 5(m) of the Act nor the broad prior restraint implications of applying the strict liability standard to the commercial speech of innocent retailers using cooperative advertising.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great importance. The court's interpretation of § 12 of the Federal Trade Commission Act as a strict liability provision involves an important question of federal law which has not been settled by the Supreme Court. Furthermore, the interplay between that section and § 5(m) of the Act creates important constitutional issues which should be considered by this Court regarding the scope of

permissible prior restraint upon the commercial speech of retailers not party to the present case.

A. The Decision Below in Interpreting § 12 of the FTC Act has Decided an Important Question of Federal Law which has not Been, but Should be Settled by the Supreme Court

Section 12 of the FTC Act has never previously been applied to a retailer using cooperative advertising who has not participated in preparation of the advertising itself and who had no knowledge of its falsity. The court below explicitly opted for a strict liability standard for application of that statute. 605 F.2d at 309. It did so by applying circuit court cases under substantially distinct factual and legal circumstances and interpreting a different section of law (Chrysler Corp. v. FTC, 561 F.2d 357, 363 n. 5 (D.C. Cir. 1977); and Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967)). In doing so, it chose to disregard the analysis of Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921 (6th

Cir. 1968), indicating that § 12 ought only to apply, even to an advertising agency, where there was actual participation in the alleged deception, which further required proof the party knew or had reason to know of the falsity of the advertising. 392 F.2d at 928. The impact of the strict liability approach of the decision below upon the retailing industry is so substantial that it raises a major question of federal law which should be resolved by the Supreme Court.

The question of statutory interpretation in the present case meets the criteria for Supreme Court review set out in United States v. An Article of Drug . . . Bacto-Unidisk, 394 U.S. 784 (1969). That case involved interpretaion of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) as to the statutory definition of "drug." When the court below determined that the particular item did not fit the definition of "drug," the government's petition for certiorari was granted

> because this interpretation of the Act raises issues of importance in the administration of the Federal Food, Drug and Cosmetic Act.

394 U.S. at 791. Amici submit that the statutory interpretation issue in the present case raises equally compelling issues in the administration of the FTC Act.

B. The Impact of the Decision as a Prior Restraint Upon the Commercial Speech of the Retailing Industry at Large.

It is now recognized that commercial speech, including advertising, is protected by the First Amendment. Bates v. Arizona, 433 U.S. 350 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); and Bigelow v. Virginia, 421 U.S. 809 (1975).

Although there still are residual distinctions between the scope of the First Amendment as it applies to commercial rather than non-commercial speech (see, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)), the scope

of the privilege is unclear in many areas. This need for guidance is especially urgent in interpreting the scope of permissible prior restraint under the FTC Act.

The present controversy is an especially appropriate case for the Court to review the prior restraint issue. The lower court's decision that a retailer participating in a cooperative advertising campaign covering a food, drug, cosmetic or device can be held strictly liable under § 12 of the Act will necessarily place a substantial prior restraint on future advertising campaigns by any retailer, knowing that his use of cooperative advertising furnished by others could subject him to substantial penalties under the Act even if he has acted with reasonable prudence and innocence.

The prior restraint resulting from the present case has a scope extending beyond both the products in question and the particular retailer who is a party to the order. The principle approved by the

circuit court would apply across the board to all foods, drugs, cosmetics and devices. Furthermore, by virtue of § 5(m) of the FTC Act, this restraint would apply in the present case to any retailer aware of this cease and desist order who utilizes any Porter & Dietsch cooperative advertising without complying in full with the order. Should similar orders be issued in future cases involving other products, there will be an increasing reluctance for the retail industry to advertise any food, drug, cosmetic or device through cooperative advertising programs furnished by their suppliers. Amici believe that the important constitutional questions raised in the present case should be met by the Supreme Court.

CONCLUSION

The present case involves a fundamental issue concerning the interpretation and application of § 12 of the FTC Act as it applies to a significant segment of the business community. It is essential

that the issues of statutory interpretation and the scope of permissible restraints upon commercial speech raised in this case be decided by this Court.

Respectfully submitted,

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